FILED
JUN 8 1993
OFFICE OF THE CLERK

No. 92-1659

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

XYZ CORPORATION, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners respectfully submit this Reply to the Brief For The United States In Opposition To The Petition For A Writ Of Certiorari.

ARGUMENT

The United States' fundamental misstatement of the question presented by the petition and the decision of the court below reflects the confusion engendered by that decision.

1. The United States presents the question as:

> "Whether the work product doctrine gives corporate employees a right to refuse to testify about

> *their knowledge of the costs incurred by their employer in performing a government contract*, on the ground that the corporation's defense counsel had previously requested the employees to analyze those costs."

Opp. at (I) (emphasis added). The answer to the question posed by the United States is, of course, "no." The work product doctrine does not exempt a witness from testifying about the facts. But the question presented, as recast by the United States, does not reflect the issue raised by the decision of the court below. That is because the inquiries to the witnesses in the grand jury—to which Petitioners objected, and which were the subject of the decision of the court below—were *not* directed to the witnesses' "knowledge of costs incurred . . .," but rather to the witnesses' efforts for counsel. To the extent the government was interested in the underlying facts, it chose to get at those facts in an impermissible way—by seeking to discover them by asking about the witnesses' efforts for defense counsel.

Specifically, having learned that the individual Petitioners had performed analyses at the direction of Company counsel, the government asked directly and repeatedly about *those* analyses and the conclusions drawn from them: "what did you do?", "tell us . . . what analysis you performed?", "what analysis did you conduct?", "what reviews . . . did you conduct?", "were these [analyses] accurate?", "tell us what that study was?", and "what conclusions did you draw?" Pet. at 7 and App. 13a, 14a (Questions 1-6, 13). The holding of the court below is that the government was permitted to ask those specific questions. The failure of the United States to acknowledge the difference between asking about the underlying facts directly, on the one hand, and finding facts by asking directly for defense counsel's work product, on the other, demonstrates the confusion on this important issue engendered by the decision below.

2. Similarly, it is simply not true, as the United States argues, that

> "The breadth of petitioners' theory is illustrated by their claim that the government cannot even ask the witnesses "[w]hat documents would you need to review' and '[w]hat questions would you need answers to,' to be able 'to estimate the total labor and other costs incurred by XYZ in connection with the Fox contracts prior to termination.' "

Opp. at 10, *citing* Pet. App. 14a-15a. No objection was ever raised to these "Category III" questions.[1] To the contrary, our Petition reiterates the same view of these "Category III' questions as we took in the court below: [2] ". . . these 'Category III' questions, which do *not* inquire about the analyses performed for counsel, could properly be asked by the government (provided the witnesses were instructed to answer from their pre-existing knowledge of the underlying facts and without reference to their work for Company counsel)." Pet. at 6, App. 14a-15a. Petitioners repeatedly urged the government to ask the witnesses questions about the underlying facts, or to perform any analysis the government wished, but simply not to ask about the analysis done for defense counsel. App. 5a. In short, these "Category III" questions were *not* at issue in the court below and are not at issue in this Petition. The Category III questions do, however, serve to highlight the critical distinction between proper questions about a witness' knowledge ("What documents *would you need to*

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[1] The government did *not* pose such questions to the witnesses in the grand jury. These questions were the Category III (the "Kleinberg questions") questions tendered by the government on May 4, 1992 late in the district court proceedings, as questions the government proposed to ask in the future. *See* App. 6a, 14a. These questions were of a different character than those that had been previously tendered, for they did not inquire about the analyses for counsel.

[2] *See* Br. For Intervenor-Appellant XYZ Corporation, No. 92-6147 at 17-18 (the brief for Petitioners in the Second Circuit).

review to estimate . . . costs . . .?") (App. 14a), and the improper questions, directed to a witness' work for defense counsel, which the court below mistakenly approved ("What records *did you review* [to assist Company counsel]?" (App. 14a)).

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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